UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MICHAEL FEIST,
Charging Party,

and

Case Nos.
25-CA-130127
25-CB-130081

INDUSTRIAL CONTRACTORS SKANSKA, INC.,
Employer,

and

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 561,
Union.

CHARGING PARTY'S REPLY BRIEF TO INDUSTRIAL CONTRACTORS SKANSKA, INC.'S ANSWERING BRIEF

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I. INTRODUCTION

On March 24, 2015, Charging Party Michael Feist ("Feist") filed Exceptions and a Brief in Support of Exceptions ("Exceptions Brief"). On April 21, 2015, Industrial Contractors Skanska, Inc. ("Employer") filed an Answering Brief to Feist's Exceptions ("Answering Brief"). Feist hereby submits this Reply Brief to the Employer's Answering Brief. For the reasons stated herein, the National Labor Relations Board ("Board") should reject the arguments in the Employer's Answering Brief.

II. RESPONSES IN OPPOSITION TO THE EMPLOYER'S ANSWERING BRIEF

A. The ALJ erred in finding that the Union failed to notify Feist he was two months in arrears because it did not have his mailing address.

Even if, *arguendo,* Feist were to concede the Employer's contention and the ALJ's finding that the Union did not have his current mailing address, the fact remains that the Union made little to no effort to discover this information, as is required by the holding in *Oklahoma Fixture Co*., 308 NLRB 335 (1992). That the Union sent its faxed discharge demand within mere *hours* of Feist's learning of the dues dispute, without it first meeting the CBA's hand-delivery requirement, is proof that it made no such effort. (TR 33).[1] In addition, what the Employer fails to note, but does not affirmatively deny, is that *it* had Feist's address on file and that nobody from Local 561 ("the Union") attempted to contact the Employer to obtain that information. It beggars belief that the Employer, which Feist has worked for and received paychecks from almost exclusively for a number of years, would not have his address. (TR 99). Indeed, this obvious fact is noted in *Oklahoma Fixture Co.*:

"…in attempting to cause and causing the discharge of [Charging Party] for being delinquent in the payment of his union dues, [the union] failed to fulfill its fiduciary obligation by giving [him]

[1] "TR" refers to the transcript of the hearing held on January 6, 2015.

adequate and reasonable notice of his dues delinquency…*The Union could easily have obtained [his] correct address from the Employer's records or even from the local telephone directory*.[2] Here, it is clear that the Union failed to contact the Employer to obtain that information, despite the fact that the Employer had his address. Instead, the Union hastily sent a faxed demand that Feist be placed out of work within mere hours of his learning of the dues dispute. (TR 33). Regardless, and as Feist stated in his Exceptions Brief, whether or not the Union had his address is irrelevant, as the Union was already under an obligation, pursuant to the compulsory unionism clause, to *hand-deliver* a notice meeting the requirements of *NLRB v. Hotel, Motel & Club Employees' Union, Local 568 (Philadelphia Sheraton Corp.),* 320 F.2d 254 (3d Cir. 1963), *enforcing* 136 NLRB 888 (1962) to both Feist *and* his job superintendent. It is without dispute that the Union failed to hand-deliver said notice to either party prior to it sending the fax in question. (TR 31).

The Employer contends that the issue regarding the Union's violation of the terms of the compulsory unionism clause in the CBA in seeking Feist's discharge "is not properly before the Board as Charging Party did not raise it in his charges."[3] In support of this contention, the Employer points to *Cotter & Co.*, 276 NLRB 714 (1985), which states that the Board will decline "to consider arguments of fact and law which are directed to issues not raised by the… complaint."[4] Thus, the Employer attempts to equate an unfair labor practice *charge* filed with a Regional Office to a *complaint* issued by a Regional Office. Paragraph 11 of Region 25's Complaint alleges that the Employer violated Section 8(a)(1) of the Act by discriminating against Feist as to the "terms or conditions of employment of its employees."[5] A significant aspect of the "terms and conditions of employment" is the discharge procedure explicitly

[2] *Id.* at 335. (emphasis added).
[3] Answering Brief, p. 9.
[4] *Id.* at p. 2.
[5] General Counsel's Complaint, p. 5.

referenced in the compulsory unionism clause of the CBA. At trial, the Employer did not object to the admission of the CBA into evidence as "General Counsel's Exhibit 2." (TR 21-22). Thus, the issue of the Union's failure to comply with the terms of the compulsory unionism clause was properly before the ALJ.

To excuse the Union's failure to comply with *Philadelphia Sheraton*, the Employer attempts to paint Feist as a recalcitrant employee who deliberately sought to avoid his Union dues obligations. The Employer equates Feist with an employee who "made a conscious and deliberate decision to evade [her obligation under the union security clause].[6] However, the Employer's own contentions and the record belie this notion. The Employer admits that, regarding Feist's earlier suspensions for dues arrearages, "[O]n all four occasions, he paid his back dues and a reinstatement fee."[7] Regarding the day Feist first learned of the dues dispute, there is no dispute that he went *twice* to the Union hall, once to make a dues payment and then to try to clear up the confusion regarding his suspension. (TR 110).

Furthermore, the uncontested trial testimony of both Feist and Union employee Diane McCormick proves that Feist went to the Union hall on April 8 to *make* a dues payment, not to *evade* making one. McCormick testified that, on the day the dues dispute took place, Feist "offered to pay his monthly dues that day." (TR 178-79). Under the circumstances, Feist bore no relationship to the type of recalcitrant employees discussed in *United Food & Commercial Workers Local 368A (Professional Services Unlimited*), 317 NLRB 352 (1995) and the subsequent line of cases. Feist went out of his way (literally) on April 8 to make a dues payment. Despite the Employer's contention to the contrary, he was not engaging in "complacency,"[8]

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[6] Answering Brief, p. 8.
[7] *Id.* at p. 6.
[8] *Id.* at p. 7.

"utter gamesmanship,"[9] or "blatant irresponsibility,"[10] but rather was trying to make a regular dues payment. The dispute erupted not because Feist was trying to evade his obligation, but because the Union had ignored both *its* notice obligations spelled out in *Philadelphia Sheraton* and in the compulsory unionism clause of the CBA. As such, *Professional Services* is inapplicable to Feist, and the Union was required to provide him with a *Philadelphia Sheraton* notice, which it undisputedly did not do.

B. The ALJ erred in not finding that the Union violated the union security provisions of the CBA and the duty of fair representation.

Section A, *supra*, addresses the Employer's argument regarding the ALJ's ability to determine whether the Union violated the delivery requirements of the notice pursuant to the terms of the compulsory unionism clause in the CBA. The Employer's second argument in this regard, that Feist was never "discharged,"[11] is a contention at odds with the facts. To wit, the Employer *completely ignores* the fact that its own employee, Cinda Titzer, unambiguously refused to send Feist to work in May despite his having made multiple requests that she do so. (TR 118). It also ignores the fact that she extended a job offer to him on June 9, only to rescind the offer later the same day, without explanation. (TR 95). This undercuts any contention by the Employer that Feist had not been "discharged."

The proposition that Feist was not "discharged" is both unsupportable and outlandish. Since the Employer's receipt of the Union's April 8 fax, Feist has not worked for the Employer. He was placed on the Employer's "Unavailable" list. Titzer suggested this action, not Feist, who certainly did not desire or request to be put out of work: "She suggested that I be placed on an unavailable status. And I agreed that might be the best thing to do at that time." (TR 116). In a

[9] *Id.*
[10] *Id.* at p. 8.
[11] *Id.* at p. 9.

mid-May conversation, Feist asked Titzer *three times* whether she would work him, to which she replied that she could "only work people from the hall who were in good standing." (TR 118). Incomprehensibly, the Employer claims that Titzer's stark refusal to provide Feist with work does not constitute an "employment action"[12] on her part. The idea that Titzer's June 9 offer to Feist to work a job at Alco Warrick Works the next morning and the subsequent rescission of the offer on the same day without explanation (TR 95) does not constitute either an "employment action" or a "discharge" defies common sense.

The Employer also disparages and downplays the significance of the very terms of the compulsory unionism clause it negotiated with the Union in an attempt to excuse the Union's failure to comply with those terms. The Employer goes so far as to call "nonsensical"[13] and "absurd"[14] Feist's expectation that the Union would "strictly comply with all of the technical requirements of the Union Security Provision."[15] Without conjecture as to why the Employer believes that compliance with the terms of a clause that it negotiated with the Union is "nonsensical" and "absurd," the Employer concedes those terms were violated, as it acknowledges that the Union failed to send the demand to the Employer by certified mail, but rather transmitted it by fax. That is a clear violation of the terms of the compulsory unionism clause, by which both the Union and the Employer were bound, and thus constitutes a violation of the Union's duty of fair representation. The Employer admits that the Union regularly violates the clause's certified mail requirement as a matter of "routine practice."[16] It is in this sense that

[12] *Id.* at p. 11.
[13] *Id.* at p. 12.
[14] *Id.* at p. 22.
[15] *Id.*
[16] *Id.* at p. 22, n. 10.

the Union's demand for Feist's discharge was "irregular,"[17] despite the Employer's contentions to the contrary.

The Employer is also at a loss to explain why the Union failed to hand-deliver the notice to Feist, despite the fact that it *twice* interacted with him at the Union hall on the very day he learned of the dispute. (TR 110). The best explanation the Employer can muster in this regard is that hand-delivery was not required because "Feist was well aware of his suspension status."[18] While Feist was admittedly aware of his suspension status, he still had not been provided, pursuant to *Philadelphia Sheraton*, with (1) the precise amount of dues allegedly in arrears, including the months for which the dues were allegedly owed and the method of said calculation; (2) a deadline by which the required payment had to be made; (3) notice that failure to pay would result in denial of employment, or (4) a reasonable amount of time to pay those amounts prior to seeking his discharge from employment.[19] The Employer apparently fails to recognize why *Philadelphia Sheraton* requirements exist. Had the Union provided Feist with a hand-delivered notice and given him a reasonable opportunity to pay, he and the Union could have sat down, compared notes, and attempted to amicably settle the dispute. The purpose underlying the holding in *Philadelphia Sheraton* is thus to avoid precisely the type of confusion regarding dues arrearages present here, where both an individual's job and livelihood are at stake.

C. The ALJ erred in finding the Union was under no obligation to provide notice to Feist of his dues obligations prior to suspending his membership because he had actual knowledge of those obligations.

Feist's Exceptions Brief discusses at length the issue of "actual knowledge." Most importantly, the brief emphasizes that the rule enunciated in *National Independent Coopers Union* is controlling:

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[17] *Id.*
[18] *Id.*
[19] S*ee Nat. Indep. Coopers Union Union (Blue Grass Cooperage Co.*), 299 NLRB 720 (1990).

While the record shows that [Charging Party] was aware of a dues obligation under the union-security provisions of the contract, *this knowledge does not relieve the Union of its fiduciary duty to advise [Charging Party], with the requisite specificity, what he must do to retain membership so as to avoid discharge*.[20]

Assuming, *arguendo*, that Feist had precise knowledge as to the amounts he allegedly owed, Board precedent confirms that the Union nevertheless failed to satisfy its burden with the requisite specificity under the holding in *Philadelphia Sheraton*. The Employer even unwittingly concedes that *Philadelphia Sheraton* is applicable to Feist: "*Philadelphia Sheraton…*generally involved situations where 'employees have… paid or attempted to pay or tender initiation fees and union dues, which were refused…'"[21] That is *precisely* what happened to Feist. In his unrebutted trial testimony, Feist had the following exchange with the Employer's counsel:

Q. Why didn't you pay it that day?
A. They said I was in suspension because I was delinquent and *wouldn't take the cash.*
Q. And I asked -- you said you have a bank account, right?
A. Yes.
Q. Why didn't you pay your dues so that they were current?
A. *They wouldn't accept it.* I was in suspension. (TR 150). (emphasis added).

Feist's situation falls squarely within the rationale spelled out in *Philadelphia Sheraton*, as he attempted to pay union dues which the Union refused to accept. Despite this refusal to accept Feist's tender, and without first complying with either the hand-delivery requirement of the compulsory unionism clause or the holding in *Philadelphia Sheraton*, the Union sent a faxed demand to the Employer seeking Feist's discharge mere hours later. In sum, Feist's alleged actual knowledge of the precise amount owed does not relieve the Union of its obligation under *National Independent Coopers Union* to provide him with a *Philadelphia Sheraton* notice.

D. The ALJ erred in finding that Feist was aware of the amount of dues he owed and what he needed to pay to reinstate his membership.

[20] 299 NLRB at 723. (emphasis added).
[21] Answering Brief, p. 16.

A legitimate dues dispute existed between Feist and the Union. In his testimony, Feist engaged in the following exchange with the Employer's counsel:

Q. Prior to April 8, 2014, when was the last time you had made a dues payment?
A. I remember making a payment in March of 2014.
Q. So when you went in, in April to pay your dues, where did you think you stood in terms of your dues payments?
A. *I honestly believed I was current.* (TR 103). (emphasis added).

As shown, Feist was *not aware* of the actual amount owed. In fact, he believed in good faith that he owed the Union no money. Since the Union claimed he *did* owe money, it logically follows that Feist was not aware of the amount of dues he owed, especially since he was not given a *Philadelphia Sheraton* notice. The most that can be argued in this regard is that Feist was aware of an amount of dues the Union *claimed* he owed, but it was his belief that he actually owed nothing. Since the Union failed to provide Feist with a *Philadelphia Sheraton* notice, he only had the Union's word to go on that he owed it any amount of money. The fact that there was legitimate confusion between the two parties regarding what, if anything, Feist owed in dues reinforces the critical role *Philadelphia Sheraton* plays here, which is to give employees and unions a chance to clear up such confusion when an individual's job is at stake. If the Union had provided Feist with a *Philadelphia Sheraton* notice, it most likely would have led to a more amicable resolution to the dues dispute. It is precisely because the Union failed to provide Feist with this notice that this case continues in litigation today.

E. The ALJ erred in finding that the Employer did not have reasonable grounds for believing that Feist's membership was suspended for reasons other than his failure to pay his monthly dues.

While the Employer eventually discovered the dispute concerned dues, the fact remains that it received a faxed discharge demand from the Union that violated the plain terms of the compulsory unionism clause in almost every regard. Under the holding in *Valley Cabinet &*

Manufacturing, Inc., 253 NLRB 98, 99 (1980), an Employer violates Section 8(a)(3) of the Act when it has reasonable grounds for believing the demand to be illegal and yet fails to investigate the nature of the demand. Here, the Employer's knowledge of the terms of the CBA should have put it on alert to undertake an investigation, as it knew or should have known that the Union's demand was unlawful and violated the duty of fair representation the Union owed Feist as a bargaining unit member.

The Employer failed to comply with the terms of the compulsory unionism clause in accepting the Union's demand by fax rather than by certified mail. This is because it was not familiar with the procedures explicitly outlined in the compulsory unionism clause it had negotiated with the Union for the processing of a discharge request. A cursory review of the clause would have informed the Employer that the Union's demand violated nearly *every* provision in question. Had the Employer been knowledgeable regarding its CBA with the Union, it would likely have realized this. It could have then demanded that the Union comply with the terms of the compulsory unionism clause before attempting to seek Feist's discharge by reminding the Union of the hand-delivery requirement, which requires the notice to be provided to both Feist and to his job superintendent. The Employer failed to undertake the requisite investigation despite the Union's dubious demand, and thereby violated the Act.

F. The ALJ erred in finding that the Employer could not recall Feist to work pursuant to the union security provisions in the CBA.

Despite the Employer's contention to the contrary, the evidence that the Employer *was* legally privileged to recall Feist to work pursuant to the compulsory unionism clause is stark, as is discussed at length, *supra*. The fact that Cinda Titzer offered a job to Feist on June 9, more than *two months* after the dues dispute was brought to Feist's and the Employer's attention, is proof positive that the Employer *did* believe that it could recall Feist to work pursuant to the

compulsory unionism clause in the CBA *despite the fact that the dues dispute had not been rectified*. That fact is damning to the Employer, which likely explains why it fought hard at trial to suppress that evidence, which the ALJ entered into the record over its and the Union's protestations. (TR 95). It may also explain why the Employer's Answering Brief is devoid of any mention of the June 9 job offer Titzer extended to Feist and then quickly rescinded. One thus wonders how the Employer could possibly believe that it was *not* legally privileged to recall Feist, only to abruptly offer him a job two months later although it, correctly, *had no reason to think the dues dispute had been settled.*

Furthermore, the Union and the Employer were both signatories to a CBA with a detailed compulsory unionism clause outlining the procedures by which the parties are to process discharge requests. As a member of the bargaining unit, the Union owed Feist a duty of fair representation, which included an obligation not to act "arbitrarily"[22] by failing to abide by the terms of the compulsory unionism clause in the CBA when making a discharge demand. While the Employer may believe that compliance with the clause's requirements is "nonsensical"[23] and "absurd,"[24] it is the Employer, not Feist, who negotiated those terms with the Union. The Union's failure to comply with the compulsory unionism clause is proof that its discharge demand was improper and that the Employer need not honor it. As such, the fact that the Employer was legally privileged to recall Feist is evinced not only by its June 9 job offer to him, but also by virtue of the illegal nature of the Union's faxed discharge demand.

Respectfully submitted,
/s/ Byron Andrus

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Attorney for Charging Party

[22] *Vaca v. Sipes*, 386 U.S. 71 (1967).
[23] Answering Brief, p. 12.
[24] *Id.* at 22.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2015, I filed via E-filing the foregoing **CHARGING PARTY'S REPLY BRIEF TO INDUSTRIAL CONTRACTORS SKANSKA, INC.'S ANSWERING BRIEF** with the National Labor Relations Board. I also certify I have served said brief via e-mail to the following parties to this action:

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